IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-86

UNITED STATES OF AMERICA,

Petitioner,

v.

FORREST S. TUCKER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT TUCKER

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OPINION BELOW

The Opinion of the Court of Appeals for the Ninth Circuit is reported at 431 F.2d 1292 (1970).

JURISDICTION

This court has jurisdiction under 28 U.S.C. 1254 (1), the timely petition of the United States for writ of certiorari having been granted on May 3, 1971.

QUESTION PRESENTED

Whether the Court of Appeals properly directed the district court judge to reconsider respondent's sentence after proceedings under 28 U.S.C. 2255 disclosed that two of three prior convictions which the judge had considered in imposing the maximum punishment were invalid because of denial of counsel.

STATEMENT OF THE CASE

In 1953 respondent Tucker was tried in federal district court on a charge of robbery of a Berkeley, California, bank. The only persons in the bank at the time of the crime were four female employees (App. 16, 17), three of whom testified about the event. Their testimony disclosed that the robbery was conducted without violence and without any force or infliction of harm (e.g., App. 5, 11-12, 21). The robber had a gun, but apparently did not point it at anyone, for each of the employee witnesses testified merely that he "showed" the gun to her (App. 4, 10, 20). Tucker testified on his own behalf, denying that he was the robber. He was impeached by three prior felony convictions (App. 24-26).

The jury returned a verdict of guilty, and a sentencing hearing was conducted before the judge. F.B.I. agent Poole testified as to respondent's prior criminal record as follows:

1. In 1938 respondent, then 17, was convicted in Florida of grand larceny and breaking and entering. His sentence was ten years, of which he served seven years, including more than five of a "chain gang" (App. 28-29).
2. In 1946 respondent was convicted in Louisiana of burglary and sentenced to four years in prison (App, 30).
3. In 1950 in Florida respondent was convicted of burglary and given a five year term of imprisonment (App. 30).

It was brought out that respondent was also then a suspect in several robberies in Northern California and under indictment for robbery in Los Angeles, but the prosecutor emphasized that

> "... I bring this out ... not because since he [respondent] has been found guilty that that should be taken into account in increasing punishment, but I only tell you so that Your Honor will know that perhaps he will face other charges." (App. 31.)[1]

The following exchange also occurred at the sentencing hearing:

> "MR. RUST [defense counsel]: ... I am just wondering how much the Court should take into consideration of these pending charges—which the Court has no way of knowing the truth or falsity of.
>
> "THE COURT [District Judge Harris]: I am not going to take into consideration in the matter of sentence the Los Angeles case because that will be dealt with appropriately. Either he will be acquitted or convicted." (App. 34)[2]

Respondent himself asked Judge Harris to consider that he had never previously been given probation or a suspended sentence and had previously served seven years on his first Florida conviction and over 3½ years on the Louisiana conviction. (App. 35).

The judge pronounced sentence of 25 years imprisonment—the statutory maximum. (App. 37). 18 U.S.C. 2113 (a) and (d) (up to 25 years for robbery with dangerous weapon). While the record does not directly reveal the

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[1]That is, the prosecutor did not view the unadjudicated charges as factors militating in favor of a lengthy sentence.

[2]Of the anticipated prosecutions of respondent in Northern California the judge said: "I assume that whatever sentence is meted out to the defendant in the case at bar will be considered in connection with the prosecution or absence of prosecution of those cases." (App. 37.)

judge's reasons for imposing the maximum sentence, his remark to defense counsel concerning the pending Los Angeles charge makes it apparent that the judge would give little or no weight to charges on which a defendant's guilt or innocence had yet to be adjudicated.

Shortly thereafter respondent was convicted in a California court of multiple counts of robbery. These convictions, however, were collaterally attacked by respondent and set aside.[3] Respondent advises that there are no outstanding criminal charges against him. Since respondent has already served 18 years imprisonment for the Berkeley bank robbery, there is a substantial likelihood that reconsideration of his sentence will result in his release from confinement.

The proceeding now before this Court arose under 28 U.S.C. 2255 when respondent moved the district court to vacate his 1953 sentence of 25 years on the ground that two of the prior convictions that were before the court in 1953 were invalid under *Gideon v. Wainwright*, 372 U.S. 335 (1963). It is conceded that, as the California courts determined in 1966 (App. 58-59), respondent's 1938 Florida conviction and his 1946 Louisiana conviction were obtained in violation of due process and are void because in both instances respondent was denied the assistance of counsel.[4]

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[3]See *Tucker v. Craven*, 421 F.2d 139 (9th Cir. 1970), cert. den. 398 U. S. 929 (1970). Respondent has furnished counsel with a copy of the state court order dismissing the charges (compare Brief for United States, p. 4 n. 2), which is appended hereto as Exhibit A.

[4]The validity of respondent's third conviction—in Florida in 1950—is not at issue. The United States, however, asserts that respondent did have counsel at the 1950 proceeding. (Brief for United States, p. 16 n. 9.) Respondent has advised his attorneys that in the 1950 Florida proceeding he specifically asked the judge to appoint counsel for him because of his indigence. The request was denied. A codefendant of respondent's retained private counsel, but this attorney never consulted with respondent. Respondent was not tried together with this codefendant and was forced to proceed in propria persona.

The district court denied relief, but the Court of Appeals reversed. It found "a reasonable probability that the defective prior convictions may have led the trial court to impose a heavier prison sentence than it otherwise would have imposed." (App. 47). The cause was remanded for reconsideration of sentence. The Court of Appeals found that placing the two invalid prior convictions before the jury (see *Burgett v. Texas*, 389 U.S. 109, 115 (1967)) was harmless error in view of the strong evidence of guilt and thus upheld the conviction itself (App. 47).

SUMMARY OF ARGUMENT

I. In robbing the Berkeley bank respondent committed a serious crime. A substantial prison term was plainly warranted. Yet a number of factors mitigated against imposing the statutory maximum of 25 years imprisonment. First, respondent used neither force nor violence. Secondly, although his carrying a gun subjected him to a maximum term of 25 years rather than 20 (compare subsections (a) and (d) of 18 U.S.C. 2113), he did not point it at any of the bank employees but merely "showed" it to them. Since the trial judge indicated that he did not at sentencing take into account charges of crime for which the defendant's guilt or innocence had not been determined, he must have based his decision to impose the maximum penalty at least in part on the three prior adjudications of respondent's guilt of felonies.

Yet two of these prior convictions were void for want of due process—for denial of the right to counsel, whose assistance this Court has held essential if one accused of a felony is to have any fair chance to establish his innocence.

Putting aside for the moment the question of prejudice, there was clearly technical error. The sentencing proceedings were conducted on the assumption that respondent had been *convicted* of two prior felonies when, constitutionally, he had not been. Had the sentencing hearing been conducted after *Gideon v. Wainwright*, the investigating

officer would have reported to the judge that respondent had been *arrested* in Florida in 1938 and in Louisiana in 1946 and that, because subsequent adjudications were constitutionally infirm, respondent's guilt or innocence on the charges had yet to be determined. The difference between an arrest and a conviction is surely of sufficient significance to compel the conclusion that, disregarding the issue of prejudice, respondent's sentencing proceeding was infected by error qua error.

Realizing this, the United States asks this Court to revalidate the defective prior convictions by holding that as to sentencing proceedings *Gideon v. Wainwright* will not be given retroactive application (App. 6, 14). But this Court has always applied its right-to-counsel due process decisions retroactively on the ground that, without counsel assisting the accused, the adjudication of his guilt is inherently unreliable. The presumption of innocence simply is not removed by uncounseled proceedings. The United States offers no reason or logic for refusing to give *Gideon* retroactive effect here (other than that the error was harmless, a separate point).

II. In the context of its mootness cases, this Court has already decided that there is a significant difference in the eye of a sentencing judge between an accusation of crime and a conviction. In *Sibron v. New York*, 392 U.S. 40, 56 (1968), the defendent had fully served his term of imprisonment, but this Court reviewed his conviction because of the "collateral consequence" that it might be used against him in future sentencing proceedings. *Sibron* necessarily upholds the Court of Appeals, decision in the present case that there was a "reasonable probability" that respondent's two defective prior convictions affected his sentence.

Moreover, under the common law of judgments a criminal conviction is res judicata—a conclusive adjudication of guilt. A convicted felon in respondent's position was, until *Gideon* made collateral attack possible, estopped to deny guilt of the crimes for which he stood convicted. Not only

that, but respectable authority held that imposition of a lengthy sentence estopped the convicted felon from denying the severity of the particular criminal acts purportedly supporting the conviction. Under this state of the law respondent's failure at the 1953 sentencing to assert innocence in respect to his 1938 and 1946 convictions—a factor stressed in brief by the United States—is in no way probative of guilt. It is irrelevant.

Wholly apart from the law of res judicata, the legal literature has repeatedly pointed out that unadjudicated charges of crime are not and must not be given the weight of prior convictions. There are many statements by judges themselves that they give more severe sentences to a defendant with one or more prior felony convictions. These authorities too support the Court of Appeals holding that respondent might have been given a less severe sentence had the 1938 and 1946 incidents been viewed as unadjudicated charges rather than convictions.

III. The four factors judges have traditionally weighed in imposing sentence are (1) punishment of the defendant for his wrong, (2) deterrence of others, (3) protection of society by segregating the defendant, and (4) rehabilitation of the defendant. When Judge Harris in 1953 imposed on respondent the maximum 25-year term of imprisonment, he could not realize that the more than 10½ years respondent had theretofore spent in prison, including 5½ years on a chain gang, was, as a matter of constitutional law, wrongful imprisonment. Had the judge had the benefit of *Gideon*, he might well have discounted the punishment factor in view of respondent's having already suffered over 10 years incarceration in violation of his constitutional rights. For the same reason the judge might have decided that respondent was not an appropriate defendant to sentence severely in order to deter others. With the judge's focus on rehabilitation of respondent and protection of society, it is reasonably probably that a more lenient sentence would have been imposed.

IV. The United State's fear (Brief, pp. 6-7 14) that affirmance of the Court of Appeals will require district court judges to reconsider a "vast number of sentences" (id at 14) rests on factually inaccurate premises and ignores pertinent statistics. The relief given respondent by the court below is proper only in the case of a defendant sentenced prior to the *Gideon* decision in March, 1963. At post-*Gideon* sentencing proceedings, defense counsel need only have pointed out the constitutional defect in any uncounseled prior convictions. They would then have been properly considered as unadjudicated charges of crime. Statistics disclose that more than 90% of convicted defendants sentenced eight or more years ago have already been released from prison. Moreover, the chances that a defendant sentenced before March, 1963 might have a prior conviction invalid under *Gideon* are slim, since as early as 1938 the great majority of jurisdictions appointed counsel for indigents charged with a felony. Finally, there has been since 1966 precedent for the relief given respondent (Bauers v. Yeager, 261 F.Supp. 420 (D.N.J. 1966)), but the reported decisions show not even a trickle, yet alone a flood, of similar petitions for resentencing.

Whether viewed from the standpoint of Fifth Amendment due process or the statutory mandate of 28 U.S.C. 2255 to correct serious errors in the sentencing process (even if not of constitutional dimension), it was proper to direct reconsideration of respondent's sentence in this case.

ARGUMENT

I

UNLESS *GIDEON V. WAINWRIGHT* IS REFUSED RETROACTIVE EFFECT IN THIS CASE, USE OF RESPONDENT'S INVALID CONVICTIONS AGAINST HIM AS CONVICTIONS (RATHER THAN ARRESTS) WAS AT LEAST TECHNICAL ERROR.

A conviction is much more than an arrest or accusation of criminal conduct. A conviction is conclusive of guilt; sentencing judges give a conviction far more weight than an unadjudicated accusation of criminal conduct.[5] For purposes of determining whether respondent has been denied due process (or whether his sentence was otherwise subject to attack under 28 U.S.C. 2255), the 1938 and 1946 convictions are concededly void. They have the status of mere arrests. Yet the transcript of respondent's sentencing hearing shows clearly that these incidents on respondent's record were treated as *convictions*, not as unadjudicated accusations. Putting aside the question of prejudice, this was certainly error if *Gideon v. Wainwright*, 372 U.S. 335 (1963), is applicable here.

To avoid this conclusion the United states contends that *Gideon* is not retroactive here (App. 6, 14, 16 n. 8). But this Court has always applied right-to-counsel decisions, such as *Gideon*, retroactively, "because the rule affected 'the very integrity of the fact-finding process' and averted 'the clear danger of convicting the *innocent*,'" *Johnson v. New Jersey*, 384 U.S. 719, 727-728 (1966) (emphasis added), and because "the judgment *lacked reliability*." *Linkletter v. Walker*, 381 U.S. 618, 639 n. 20 (1965) (emphasis added). See also *McConnell v. Rhay*, 393 U.S. 2, 3 (1968).

Right-to-counsel decisions have been given fully retroactive application not only to set aside uncounseled convic-

[5] See part II of the Argument herein.

tions themselves but to redress the collateral consequences of denial of counsel. In *Arsenault v. Massachusetts*, 393 U.S. 5 (1968) an uncounseled guilty plea was placed before the jury. The resulting conviction was invalidated by giving retroactive effect to *White v. Maryland*, 373 U.S. 59 (1963). The judgment in *Burgett v. Texas*, 389 U.S. 109, 114-115 (1967), where uncounseled convictions were before the jury, was overturned by giving retroactive effect to *Gideon*.

Since, as the United States concedes (Brief, pp. 8, 11) information considered at sentencing must be substantially correct and reliable, see *Townsend v. Burke*, 334 U.S. 736, 741 (1948), and since this court has repeatedly held that uncounseled convictions are "unreliable" because the defendant may well have been innocent but unable to prove so without aid of counsel, the *Gideon* rule should be applied retroactively in this case.[6]

The United States also seems to contend (Brief pp. 8-10) that the broad discretion exercised by a sentencing judge precludes a finding of error in this case. Such discretion is, of course, the touchstone of modern penology and is in no way constitutionally objectionable itself. *McGautha v. California*, 402 U.S. 183, 207 (1971); *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969); *Williams v. New York*, 337 U.S. 241, 247 (1949). But that discretion has never entitled a sentencing judge to consider materially inaccurate and unreliable information. *E.g.*, *Townsend v. Burke*, supra, 334 U.S. 736, 741 (1948); *United States v. Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970); *United States v. Perchalla*, 407 F.2d 821, 823 (4th Cir. 1969); *Verdugo v. United States*, 402 F.

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[6]The fact stressed by the United States (Brief p. 16 n. 8), that respondent did not deny "the accuracy of the relevant convictions," goes to the question of prejudice, not the question of whether there was error. Respondent was not required to anticipate *Gideon*, as that decision itself makes clear. As noted in part II of this Argument, the very fact of conviction precluded a claim of innocence.

2d 599, 610-612 (9th Cir. 1968), cert. den. 397 U.S. 925 (1970).[7]

As aptly observed in *United States v. Lewis*, 392 F.2d 440, 442 (4th Cir. 1968), where mistake in the sentencing process may have resulted in substantial injustice, to direct reconsideration of the sentence "does not obtrude on the District Judge's discretion; to the contrary, it restores it." In the instant case, the sentencing judge's comment that he would not consider charges against respondent of bank robbery in Los Angeles suggests that the judge, in the exercise of *his* discretion, would weigh prior convictions but not unadjudicated accusations. Since *Gideon* had not then been decided, the judge had no opportunity in respondent's case to accurately apply this discretionary distinction as he was entitled to do. The judgment below gives him the opportunity to do so.

Respondent fully agrees with the United States that the doctrine of *Townsend v. Burke* embraces only serious and fundamental error in the sentencing process. But decisions such as *Arsenault v. Massachusetts, supra*, 393 U.S. 59 (1968), and *Burgett v. Texas, supra*, 389 U.S. 109 (1967) have firmly established that use against an accused of a prior plea or conviction obtained through denial of counsel is such a fundamental error. It does not necessarily follow from that conclusion, however, that all instances of collateral use of a prior conviction invalid under Gideon are prejudicial to the convicted person. Whether there was prejudice in respondent's case is the primary question now before the court.

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[7] [T]he specific sentence selected, may be beyond the ken of the appellate court. But the appellate court must scrutinize the sentencing process to insure that the trial judge has considered the information available with some regard for its reliability, and has evaluated the information in light of the factors relevant to sentencing." *Scott v. United States*, 419 F.2d 264, 266 (D. C. Cir. 1969).

II

UNDER THIS COURT'S MOOTNESS DECISIONS AND UNDER THE LAW OF RES JUDICATA, THE ERROR WAS PREJUDICIAL, SINCE A CONVICTION, UNLIKE AN ARREST, IS CONCLUSIVE OF GUILT. SENTENCING JUDGES HAVE ALWAYS GIVEN CONVICTIONS MORE WEIGHT THAN UNADJUDICATED CHARGES.

The 1938 and 1946 incidents on respondent's rap sheet were received against him as *convictions* (for larceny and burglary). With *Gideon* retroactive, we know now that they should have been viewed only as arrest—as accusations of crime for which respondent's guilt was unadjudicated. Is there, in the sentencing context, a substantial difference between prior arrests and prior convictions? If so the Court of Appeals properly found the error prejudicial.

In its decisions on the question of mootness, this Court appears already to have established that there is such a substantial difference. In *Sibron v. New York*, 392 U.S. 40, 55-56 (1968), the defendant had completed his jail term before the matter reached this Court for review. The case was held not moot, however, because of the collateral consequences of the conviction, one of which—emphasized in the *Sibron* opinion—was that the conviction would be before the courts in any future sentencing proceedings involving Sibron. 392 U.S. at 56. As explained in *Street v. New York*, 392 U.S. 576, 579-580 n. 3 (1969), *Sibron* holds that a criminal case is not moot where "the conviction could be used for impeachment and *sentencing* purposes in future criminal proceedings." (Emphasis added.)

In *Fiswick v. United States*, 329 U.S. 211 (1946), the case was held not moot because of the collateral consequence that the defendant's conviction might be used against him in deportation or naturalization proceedings, where "character" is an issue.[8] The Court said:

[8]Under modern sentencing philosophy that same "character" trait is one of the primary considerations of the judge. *Williams v. New York*, supra, 337 U. S. 241, 248 n. 10 (1949); *Pennsylvania v. Ashe*,

> "[T]he judgment, if undisturbed, stands as unimpeachable evidence that Fiswich committed the crime charged. . . .
>
> "An outstanding conviction for this crime stands as ominous proof that he did what was charged and puts beyond his reach any showing of ameliorating circumstances or explanatory matter that might remove part or all of the curse." 329 U.S. at 221-222.

Even where a conviction is reversed, the underlying arrest and accusation of crime can be considered in future proceedings. (See Brief for United States, pp. 10-11, and authorities there cited.) This was true of the arrests of the defendants in both *Sibron* and *Fiswick*, yet this Court considered the collateral consequences of a conviction so much more serious than that of an unadjudicated charge or arrest that cases otherwise moot were decided on their merits and the judgments reversed.

What was said expressly in *Fiswick* (and implicitly in *Sibron*) is a correct statement of the prevailing American law on the collateral estoppel effect of a conviction—including convictions from another jurisdiction. In several states, such as Pennsylvania, the life or death sentence of a defendant convicted of first-degree murder is determined by a jury, which is given "'the same sort of information that a judge considers when deciding as to punishment for crime.'" *Commonwealth v. Thompson*, 389 Pa. 382, 133 A. 2d 207, 215 (1957), cert. den 355 U.S. 849 (1957). This includes prior convictions, which the jury considers for the bearing they have on the defendant's character.[9] The Pennsylvania Supreme Court has declared such prior convictions to be conclusive determinations of guilt of the underlying offense. *Commonwealth v. Thompson, supra*, 133 A.2d at

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302 U. S. 51, 55 (1937). The logic of *Fiswick* is thus as applicable to sentencing as it is to naturalization and deportation proceedings.

[9]Significantly, the jury as sentencing authority may not be advised of the defendant's prior arrests. *Commonwealth v. Thompson, supra*, 133 A.2d at 217 (1957).

218 (prior U. S. military court martial conviction); *Commonwealth v. Simmons*, 361 Pa. 391, 65 A.2d 353, 359 (1949), cert. den. 338 U.S. 862 (1949).

Under typical recidivist sentencing statutes, which make an increased sentence mandatory in the event the defendant has prior felony convictions, the defendant is estopped by the conviction to assert innocence of the prior crime. *E.g., People v. Rice*, 169 Misc. 591, 8 N.Y.S. 2d 87 (Kings County Ct. 1938); *People v. Dacey*, 166 Misc. 827, 3 N.Y. S. 2d 156, 161 (Gen. Sess. N.Y. County 1938); former 26. U.S.C. 7237(c) (2), 68A Stat. 860, as amended (sole issue is whether defendant is same person who suffered prior conviction) (repealed effective May 1971, 84 Stat. 1236); cf. American Law Institute, Model Penal Code §§ 7.03–7.05 (1962).[10]

The collateral estoppel effect of a prior conviction is also found in the analogous cases where priors are used to impeach a witness by showing a character defect. (Analogous, since the sentencing the prior convictions are received for their bearing on character. See footnote 8, *supra*.) The majority rule is that the prior conviction is conclusive of the witness' guilt and may not be rebutted by any attempted proof of innocence. See 4 Wigmore, Evidence § 1116 (3d ed. 1940); *Lee v. State*, 69 So. 2d 467, 468-469 (Ala. App. 1953) (conviction "conclusive" of guilt); *State v. Keillor*, 50 N.D. 728, 197 N.W. 859, 861 (1924) (conviction "conclusive" of guilt). As held in *Donnelly v. Donnelly*, 156 Md. 81, 143 A. 648, 650 (1928): "The party may not give evidence that he was not guilty of the crime, since the conviction is conclusive evidence of his guilt . . . ."[11]

[10]While, technically, it is the fact of conviction that triggers the increased sentence under such recidivist statutes, the obvious legislative policy and purpose is to increase punishment because of the character defect of propensity for crime, a defect inferred from prior commission of a felony, of which the defendant's guilt is conclusively presumed from his prior conviction.

[11]The rule that the conviction is "conclusive" of guilt is drawn from the law of collateral estoppel and res judicata, not the principle of

There is also respectable authority that the particular sentence imposed on a previously convicted defendant is conclusive on the severity or wrongfulness of the actual conduct purportedly underlying the conviction. That is, if the defendant was given the maximum sentence, his conduct must have been highly culpable. As this Court recognized in *Fiswick v. United States, supra,* 329 U.S. 211, 222 (1946), this doctrine bars any showing of ameliorating circumstances. The leading case is *Lamoureux v. New York, N.H. & H.R. Co.*, 169 Mass 338, 340, 47 N.E. 1009 (1897), where Justice Holmes held:

> "[T]he conviction, must be left unexplained. Obviously the guilt of the witness cannot be retired. [Citations.] It is no less impossible to go behind the sentence to determine the degree of guilt."[12]

The United States repeatedly emphasizes the fact that at the 1953 proceedings respondent did not "suggest that he had not committed either of the two offenses for which his convictions were subsequently invalidated." (Brief for United States, p. 15). That is true. Given his right of allocution, respondent indicated he felt that his guilt or innocence of the priors was "neither here nor there" (App. 35).

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the law of evidence permitting the court to restrict proof offered on matters collateral to the substantive issues being litigated. The same is true of the holding in *Lamourex v. New York, N. H. & H. R. Co.*, 169 Mass. 338, 47 N.E. 1009 (1897), quoted in text, *infra.*

As Wigmore indicates a few cases have declined to hold a prior conviction conclusive of guilt. The Court, if course, need not resolve the dispute in this case. The issue here is harmless error, and certainly it is reasonably probable that both the judge who sentenced respondent in 1953 and respondent's attorney at that proceeding believed, in light of the majority rule, that respondent's 1938 and 1946 prior convictions were conclusive of his guilt of grand larceny and breaking and entering in Florida and burglary in Louisiana.

[12]The rule stated is followed in a minority of jurisdictions. For example, *Donnelly v. Donnelly, supra,* is contra. But, again, the issue is not what the better rule of collateral estoppel is but whether the error in respondent's 1953 sentencing proceeding was prejudicial. See footnote 11, *supra.*

Surely, however, it is reasonably probable that respondent, assisted by counsel at the hearing, did not seek to ameliorate the seriously damaging impact of his prior convictions because he had been advised that those convictions were conclusive of guilt. Is it not also reasonably probable that, regardless of his guilt or innocence of the priors that were before the court, respondent did not speak about them because he had been made aware of the fact that most judges consider a man who persists in protesting his innocence after having been duly convicted to be a poor candidate for prompt rehabilitation and thus deserving of a stiffer sentence?[13] See *Scott v. United States, supra,* 419 F.2d 264 (D.C. Cir. 1969), particularly the concurring opinion of Judge Leventhal at 282.

Wholly apart from the law of res judicata and collateral estoppel, the error at respondent's sentencing hearing was prejudicial because of the likelihood that Judge Harris, like most sentencing judges, followed the practice of weighing prior *convictions* heavily against the defendent while discounting (or even disregarding) unadjudicated charges of crime.

In *United States v. Doyle,* 348 F.2d 715, 721 (2d Cir. 1965), cert. den. 382 U.S. 843 (1965), the court states that a sentencing judge is not barred from considering unproved criminal charges but adds: "Of necessity, much of the information garnered by the probation officer will be hearsay and will doubtless be discounted accordingly. . . ." The widely respected Guides For Sentencing (1957) by the Advisory Council of Judges of the National Probation and

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[13] In an analogous context, it is believed that an accused, attempting to help himself by being cooperative with the police, will admit guilt of prior unsolved crimes which, in fact, he did not commit. See F. Miller, Prosecution: The Decision to Charge a Suspect with a Crime 201 (1969).

Parole Association,[14] noting that judges generally deny probation to a defendant with a prior felony conviction (pp. 41, 49) states:

> "Several cautions should be exercised in evaluating the defendant's previous record . . . . A history of arrests should be distinguished from prior convictions." (P. 41)

American Bar Association Advisory Committee on Sentencing and Review, Standards Relating to Probation (approved Draft 1970), states that a presentence investigation should be made of the defendant's prior criminal record (p. 34), with the following caveat:

> "A word should also be added in explanation of what is meant by 'prior criminal record'. . . . By this the Advisory Committee means to include only those charges which have resulted in a conviction. Arrests, juvenile dispositions short of an adjudication, and the like can be extremely misleading and damaging if presented to the court as part of a section of the report which deals with past convictions. If such items should be included at all—and the Advisory Committee would not provide for their inclusion—at the very least a detailed effort should be undertaken to assure that the reader of the report cannot possible mistake an arrest for a conviction." (P. 37)

The prejudice to the defendant which the A.B.A. Committee fears rests on the fact that a properly informed sentencing judge does not weigh a mere arrest against a defendant nearly as much as he does a prior conviction. Indeed "evidence of mere arrests has usually been regarded as incompetent and inadmissible" at a sentencing hearing. Annotation, Court's Right, in Imposing Sentence, to Hear Evidence of, or to Consider, Other Offenses Committed by Defend-

[14] This book has been endorsed by several federal judges. *E.g.*, Murrah, The Dangerous Offender Under the Model Sentencing Act, 45 F.R.D. 161, 162-163 (1967); Thomsen, Sentencing the Dangerous Offender, 45 F.R.D. 175, 175n. 1 (1967).

ant, 96 A.L.R. 2d 768, 773 (1964), See Comment, Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study, 69 Yale L. J. 1453, 1467 n. 73 (1960).

The prejudice to a defendant resulting from a prior felony conviction on his record is particularly acute when he is eligible for probation. With respect to many offenses, the general sentencing practice is to grant probation to one without prior felony convictions and to deny probation to a defendant with such a conviction. See, *e.g.*, Dawkins, Probation or Prison? Youth or Adult [at Fifth Circuit Sentencing Institute], 30 F.R.D. 276, 276, 278 (1961); Youngdahl, Sentencing the Automobile Thief to Probation or Prison—as Youth or Adult [at Pilot Institute on Sentencing] 26 F.R.D. 300, 302 (1959); Advisory Council of Judges of the National Probation and Parole Association, *supra*, Guides For Sentencing 49 (1957). As the sentencing judge explained in *Ohio v. Emonds*, 29 J. Crim. L. C. & P. S. 427, 434 (Common Pleas, Cuyohoga County, Ohio 1938):

> "Generally a record of previous misconduct raises a presumption that the offensive conduct will be repeated in the future and therefore makes probation unjustifiable."[15]

Dawson, Sentencing: The Decision as to Type, Length, and Conditions of Sentence (1969), presents studies showing that except on conviction of the most serious crimes, a defendant with no prior convictions is almost always given probation (pp. 39, 81).

> "Attention is directed primarily at prior felony convictions. A defendant who has several misdemeanor convictions on his record or several arrests not followed by conviction is regarded as a first offender for these purposes." (pp. 81-82.)

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[15]Even where probation is inappropriate the first offender is usually treated with greater leniency than one with prior convictions. See, *e.g.*, Miller, Violations not Related to Other Crimes [at Fifth Circuit Sentencing Institute] 30 F.R.D. 310, 314 (1961); Annotation, 96 A.L.R. 2d 768, 772 (1964).

Respondent does not contend, in view of the seriousness of the crime he committed in Berkeley in 1951 and in view of his presumptively valid 1950 conviction, that absent the error he would have received probation. Respondent, even with the benefit of *Gideon*, was almost certainly going to get a substantial sentence. But that could have been 15 years rather than 25. The attitudes of sentencing judges in the probation context disclose the strong impact that prior convictions have on the courts. This same attitude appears to result in imposition of a more severe sentence on a defendant with several prior convictions (such a three in respondent's case as it appeared to Judge Harris) than with only one. See *United States ex rel Thompson v. Rundle*, 924 F.Supp. 933, 935 (E.D. Pa. 1968); cf. *Sibron v. New York, supra*, 392 U.S. 40, 56 (1968).

The United States argues at length that a sentencing judge cannot properly exercise his discretion, cannot impose a sentence that fits the criminal and his character as well as the crime, if the judge cannot examine all of the defendant's prior criminal record (Brief for United States, pp. 11-12, 14). Respondent agrees. But the United States also concedes that the evidence considered must be reliable, that is, fairly accurate (*id* at 8, 11). Reliability is particularly important in so far as the evidence may indicate that the defendant has previously committed felonies, since, "[t]oday's philosophy of individualizing sentences makes sharp distinctions for example between the first and repeated offenders." *Williams v. New York, supra*, 337 U.S. 241, 247 (1949).

The United States is in error in suggesting (Brief, pp. 11-12) that the holding below bars a sentencing judge from considering unadjudicated charges of crime. In fact, the Court of Appeals merely directed "resentencing without consideration of any *prior convictions* which are invalid under *Gideon v. Wainwright*, 372 U.S. 335 (1963)" (App. 48, emphasis added.) In other words the 1938 and 1946 incidents on respondent's record must be considered in the

proper context—as hearsay charges in no way conclusive of guilt.[16]

There is nothing in the record of respondent's 1953 sentencing hearing to suggest that the judge considered respondent's invalid prior convictions as mere unadjudicated charges. Since *Gideon* had not been decided then, there was no reason for him to do so. Reviewing that proceeding now under *Gideon's* mandate, it seems clear that respondent "was prejudiced for he was sentenced on the basis of assumptions about his criminal record which were materially untrue." *United States v. Malcolm, supra,* 432 F.2d 809, 816 (2d Cir. 1970).

III

HAD THE SENTENCING JUDGE REALIZED THAT RESPONDENT'S PREVIOUS 10-YEARS IMPRISONMENT WAS CONSTITUTIONALLY WRONGFUL IMPRISONMENT, HE MIGHT HAVE DEALT MORE LENIENTLY WITH RESPONDENT.

As the United States points out, judges consider numerous factors in assessing the appropriate sentence for a defendant. These include, of course, the defendant's potential for rehabilitation and the need to protect society from further crimes by the defendant through his segregation from society by incarceration. Additional considerations

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[16] The Court of Appeals for the Third Circuit set forth the appropriate procedure in the analogous situation where uncounseled juvenile court "convictions" are before the sentencing judge:

> "In particular, a juvenile record may, as in this case, convey instructive evidence of the defendant's probable response to remedial efforts. So long as a judge considers such a record in its proper perspective—i.e., as a reference to non-criminal proceedings where no counsel was required and where the purpose was not penal but curative—there can be no ground for complaint. Thus the absence of counsel at juvenile proceedings is a factor which limits the use of the juvenile record, but does not forbid it." *United States v. Myers,* 374 F.2d 707, 708 (3d Cir. 1967).

which militate in favor of a lengthy sentence are (1) deterring others from similar crime does not pay (the deterrent factor) and (2) punishing the defendant for his wrong (the retributive factor). See S. Rubin, The Law of Criminal Correction 646 (1963).

It seems reasonably probable that Judge Harris, decision to impose on respondent the maximum 25-year sentence was based in part on the deterrent and retributive factors. But, since *Gideon* had not then been decided, the judge in making his decision was necessarily unaware that the more than 10½ years respondent had previously spent imprisoned, including 5½ years on a chain gang, was constitutionally wrongful imprisonment. In sum, respondent had already suffered extensive and severe punishment in violation of his constitutional rights enunciated in *Gideon*. If this could have been brought out, the judge surely would have discounted the retributive factor of sentencing in respondent's case. Likewise he might well have concluded that respondent was not the appropriate defendant to sentence harshly for the purpose of deterring others. Unquestionably respondent's prior imprisonment on unreliable, uncounseled convictions afforded reasonable grounds for some mercy (for example, a 15- or 20-year sentence rather than the maximum). The order of the Court of Appeals now gives Judge Harris the opportunity to exercise his discretion in the light of such considerations.

Admittedly the opinion of the Court of Appeals here does not expressly invoke this theory; however, it is well-supported by precedent and is an alternative basis for affirming the decision below.

In *Bauers v. Yeager, supra,* 261 F.Supp. 420 (D.N.J. 1966), the habeas corpus petitioner was serving a term in prison on three state-court convictions in 1961 for armed robbery. In 1964 the state court expunged a 1953 conviction—on which petitioner had served 16 months in prison—for failure to have treated petitioner as a juvenile offender in the 1953 proceedings. The Federal district

court held petitioner not entitled to have the 16 months wrongfully served by him "credited" against his 1961 sentence for the robberies. However, the court held:

> "[O]ur conclusion does not mean that petitioner is to be denied relief by this court. In the usual case where a defendant has served time under a sentence which had been judicially declared illegal and is subsequently brought before a court for sentencing on another matter, he has the opportunity of bringing that fact to the attention of the sentencing court. In the instant case, however, because of the timing of the suit brought to have the sentence expunged, petitioner could not present the pertinent fact to the court at the time of his sentencing in 1961. Illegally depriving a man of his liberty for a period of time is a serious matter, and we feel that due process requires that petitioner be given the opportunity of presenting this fact for consideration to the sentencing court." 261 F.Supp. at 424-425.

Precisely the same holding, under similar circumstances, was made in *United States v. Rundle*, 279 F.Supp. 153 (E.D.Pa. 1968).

In the instant case the district courts should at least have the opportunity to consider the reasoning of these precedents and to weigh respondent's prior wrongful imprisonment against the factors which, in its discretion, previously led it to impose the maximum sentence. The judgment below properly gives Judge Harris such an opportunity.

IV

THE DECISION BELOW WILL NOT OPEN A FLOODGATE TO COLLATERIAL ATTACKS SINCE, STATISTICS SHOW, VERY FEW DEFENDANTS SENTENCED PRE-*GIDEON* ARE STILL INCARCERATED. FEW OF THOSE WHO ARE HAVE PRIORS UNDER *GIDEON*.

The United States' parade of horrors argument foresees the decision below as requiring "the reopening of a vast number of sentences" (Brief, p. 14). This speculation is refuted by the available facts.

Firstly, there is nothing novel about respondent's petition for relief. It has been settled since 1948 that due process is violated and resentencing appropriate where a "prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue." *Townsend v. Burke, supra,* 334 U.S. 736, 741 (1948). The reported decisions show no flood of petitions based on this doctrine. It has also been clear since *Linkletter v. Walker, supra,* 381 U.S. 618, 639 n. 20, decided in 1965, that an uncounseled felony conviction is unreliable as an indication of guilt. Viewed as proof of guilt it is materially untrue under the *Townsend* test. Secondly, as noted in part III of the Argument herein, there has been since 1966 square precedent that reconsideration of sentence is required where what appeared at sentencing to be a valid prior conviction is subsequently set aside.

Thus, the flood of petitions feared by the United States should have appeared several years ago. None has, so far as the reported cases show. In fact, the various lower courts appear to have had no difficulty in handling attacks on sentences based on the *Townsend* principle and in formulating the appropriate relief. See, *e.g., United States v. Malcolm, supra,* 432 F.2d 809 (2d Cir. 1970); *Scott v. United States,* 419 F.2d 264, 266 (D.C. Cir. 1969); *Putt v. United States,* 363 F.2d 369 (5th Cir. 1966), cert. den. 385 U.S. 962 (1966) (sentencing judge found untrue data did not influ-

ence his decision); *State v. Pohlabel*, 61 N.J. Super. 242, 160 A.2d 647 (1960); *Ex Parte Hoopsick*, 172 Pa. Super. 12, 91 A.2d 241 (1952). Cf. *United States v. Eberhardt*, 417 F.2d 1009, 1014-1015 (4th Cir. 1969), cert. den. 397 U.S. 909 (1970) The lower courts have not infrequently granted reconsideration of sentence, and, obviously, they have not found insurmountable difficulties in the fears expressed by the United States in the instant case that the sentencing judge may not recall the reasons for his sentence imposed several years before[17] or may be dead or retired. Certainly the record in the instant case in no way suggests that the lower courts are suffering such administrative problems in applying the *Townsend* principle. It would seem to be unnecessary for this Court to act as supervisor over the procedures being developed in the lower courts until problems do arise or inconsistent treatment in the circuits emerges.

In any event, to the extent that affirmance of the Ninth Circuit here may be viewed as opening a floodgate, statistics show that there are very few prisoners eligible for relief. The flow purportedly being held back just is not there.

Prisoners sentenced *after* March 1963 when *Gideon* was decided,—over eight years ago—have no complaint under the ruling of the Court of Appeals in this case. *Gideon* permitted collateral attack on the defective prior convictions; all the post-*Gideon* defendant or his counsel[18] had to do was bring out the fact of denial of counsel and the sentencing judge would have properly viewed the "prior" as merely

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[17]Of course a judge will know how, as a general practice, he viewed prior convictions at sentencing proceedings. If it was his practice to usually give a stricter sentence to one with prior felony convictions, he will know that the inadvertent error in considering an invalid prior almost certainly resulted in a longer sentence and that some reduction may be appropriate.

[18]If the defendant was without assistance of counsel at sentencing he obtains relief on that ground. *McConnell v. Rhay*, *supra*, 393 U. S. 2 (1968).

an unadjudicated charge. A post-*Gideon* sentencing attorney's failure to attack the validity of the prior would be a tactical decision (such as to depict the defendant as completely repentent and cooperative) and would not warrant relief.

Among federal prisoners only 12 to 14 percent have received sentences of five years or more. Appellate Review of Sentences, Hearings before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary on S. 2722, 89th Cong. 2d Sess. p. 12 (March 1966). The average prisoner serves only 61 percent of his sentence. *Id.* at 52. More than 91 percent of federal prisoners are released from prison within five years. Among state prisoners an even greater percentage are released within five years (99 percent in some states, such as Wisconsin). Advisory Council of Judges of the National Council on Crime and Delinquency, Model Sentencing Act 24-25 (1963).

There are thus few pre-*Gideon* prisoners.[19] Of those who are, fewer still are likely to have priors defective under *Gideon.* As early as 1938 a majority of American jurisdictions appointed counsel in all felony cases. Kamisar, The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused, 30 U. Chic. L. Rev. 1, 16-17 (1962). And in most of the states which, pre-*Gideon,* did not as a matter of law require appointment of counsel, the general practice was to provide for counsel in felony cases. *Id.* at 17-20, 67-74.

Moreover, among the prisoners who were sentenced in part on *Gideon*-defective prior convictions, those who received less than the maximum sentences and who have since had disciplinary incidents at prison would probably decline to seek re-sentencing, since under *North Carolina v. Pearce, supra,* 395 U.S. 711, 726 (1969) the likely result of re-sentencing would be an increased term of imprisonment.

[19] Respondent has asked the Bureau of Prisons if it can furnish accurate current figures on this point.

The instant case does not require this Court to consider whether the *Townsend* principle is offended by use at sentencing of prior convictions retroactively invalidated for reasons other than denial of counsel. In any event, it does not necessarily follow, as the United States suggests, that resentencing is required when a prior conviction is, subsequent to its being considered at sentencing, set aside for error such as abridgement of the right of cross examination or the privilege against self-incrimination. (Compare Brief for United States, p. 14 and cases there cited.) These are serious errors, to be sure; but there are degrees of reliability of guilt determinations. Manifestly, where counsel has been denied, the conviction is wholly unreliable as proof of guilt. The *Townsend* principle admits of drawing a line at this point.

Finally, the decision below of the Court of Appeals may be affirmed as a proper exercise of its statutory power to direct reconsideration of a sentence pursuant to 28 U.S.C. 2255, without regard to whether the error in respondent's sentencing proceeding was of constitutional dimension. As the Fourth Circuit observed in *United States v. Lewis*, 392 F.2d 440, 443 (4th Cir. 1968), section 2255 specifically provides for collateral attack "otherwise" than for constitutional error. In *Lewis*, the sentencing judge's "misapprehension of law" (p. 444) was found to be such prejudicial but nonconstitutional error as to require reconsideration of sentence. Under the *Lewis* interpretation of section 2255, the unfairness in respondent's sentencing proceedings makes reconsideration appropriate, and it becomes unnecessary to decide if due process was violated. Almost certainly Judge Harris sentenced respondent under a "misapprehension" in that he viewed respondent's 1938 and 1946 convictions as conclusive of guilt. "[T]he price of correcting the injustice is insubstantial; the [respondent] can readily be resentenced." *United States v. Myers, supra*, 374 F.2d 707, 711-712 (3d Cir. 1967); See also *United States v. Lewis, supra*, 392 F.2d 440, 443 (courts will more freely order re-sentencing than they will overturn a conviction).

CONCLUSION

For the foregoing reasons the decision below should be affirmed. In the alternative, if it is felt that the lower courts should have additional opportunity to work out procedures for implementing the principle of *Townsend v. Burke*, the writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted,

William A. Norris

William A. Reppy, Jr.

Attorneys for Respondent

EXHIBIT A TO RESPONDENT'S BRIEF

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA
BEFORE THE HONORABLE LIONEL J. WILSON, JUDGE
DEPARTMENT NO. 7

IN THE MATTER OF THE APPLICATION OF FORREST S. TUCKER, Petitioner,

v.

FRANK MADIGAN, Sheriff of Alameda County and

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondents,

v.

FORREST S. TUCKER, Defendant.

No. 25174

PETITION FOR WRIT OF HABEAS CORPUS OR OTHER ALTERNATIVE WRIT

COURTHOUSE, OAKLAND, ALAMEDA COUNTY, CALIFORNIA

July 14, 1971

APPEARANCES

FOR THE RESPONDENTS: RAE BOKER, Deputy District Attorney

FOR THE PETITIONER: FORREST S. TUCKER, Appearing in Propria Persona, and assisted by:

JAMES HOOLEY, Public Defender

THE COURT: In the Matter of the Application of Forrest S. Tucker, for Writ of Habeas Corpus.

MR. HOOLEY: Yes, Your Honor, we would submit the matter.

MR. BOKER: Submitted, Your Honor.

THE COURT: This matter is on for decision this date.

This case has a history which is unique in the experience of this court in ten years on the bench. Some eighteen years ago the defendant, Forrest Tucker, was brought to trial and convicted in the United States District Court on May 23, 1953, of bank robbery and was sentenced to twenty [sic.] years in prison. In November of the same year defendant was tried and convicted in two successive trials in the Alameda County Superior Court of numerous counts of armed robbery, and on those convictions and on the basis of two prior felony convictions in Florida and Louisiana, Mr. Tucker was declared an habitual criminal and sentenced to State Prison as such.

Various proceedings were had thereafter in the State and Federal courts, and finally in 1966 the California Supreme Court ordered the Alameda County Superior Court to redetermine its prior determination of habitual criminality. After an evidentiary hearing, the Alameda County Superior Court found the two prior felony convictions were invalid in that the defendant was without counsel in each of said causes and had not intelligently waived his right to counsel and the two priors were ordered stricken.

Thereafter on January 28, 1971, the United States Court of Appeals reversed the order of the United States District Court, denying Mr. Tucker's Petition for Writ of Habeas Corpus and remanding the cause to the United States District Court for further hearing.

One of the Petitioner's contentions in the aforesaid writ challenged the adequacy of representation by Counsel in the trial in which the robbery convictions were rendered in the cause now before this Court, and it is interesting to note

the Circuit Court Specifically did not deal with this contention, Stating: "Our disposition of the case makes it unnecessary to consider appellant's second contention." Subsequently, in an Order dated March 16, 1971, Judge Oliver J. Carter of the United States District Court, remanded the case to the Alameda County Superior Court with the order that this Court set aside the verdict and sentence heretofore rendered in this Court and either grant petitioner a new trial on those charges or dismiss the indictment.

The matter having been assigned to Department 7 of the Alameda County Superior Court for proceedings in keeping with the order of the United States District Court, and evidence having been received by this Court as well as the issues of law involved, those legal issues having been discussed more extensively in memoranda submitted to this Court by each of the respective parties, this Court finds as follows:

The defendant, Forrest S. Tucker, having been in the continuous custody of the Federal Prison System and California State Prison System for approximately eighteen years.

During the period immediately preceding and at the time of defendant's trial and conviction in this County in Action No. 25174, the instant Action defendant was held practically incommunicado and extensive, unwarranted restraints were placed upon defendant's Counsel, the Public Defender of Alameda County, which unduly and unfairly restricted defendant's Counsel from adequately preparing his defense, which was based upon the theory of "alibi". In the face of vigorous objections to such motions by the prosecuting attorney, request by defense counsel for a continuance in order to prepare properly defendant's defense was denied and defendant was ordered to stand trial under circumstances which raise serious questions with respect to denial of the right to counsel and due process of constitutional dimensions.

Defendant, having been denied the right to properly prepare and present his alibi defense eighteen years ago and having been in continual custody over this same period of time, it is extremely unlikely defendant could at this

time prepare such a defense, and defendant has presented convincing evidence to this effect.

Defendant is in custody of the Federal Prison system and has been placed on lifetime parole by the California Adult Authority.

In view of all the aforesaid circumstances—and I might say the Court has also considered the impression made by the defendant on this Court during the numerous hearings in which he has been before the Court and has been impressed with the manner in which the defendant has conducted himself and the attitude he has reflected of patience and cooperation, and anyone who can be patient after eighteen years is a very patient person—the Court has also taken those factors into consideration, and in view of the aforesaid facts and circumstances, it is this Court's opinion that the considerations of justice, fairness and equity demand a dismissal and this Court does dismiss the charges contained in Indictment No. 25174 in the interests of justice and pursuant to the applicable statutory provisions, and it is so ordered.

MR. HOOLEY: Thank you, Your Honor. May the defendant be released from the order which brought him from McNeil?

THE COURT: It is so ordered.

MR. HOOLEY: Thank you.

THE COURT: Good luck to you.

MR. TUCKER: Thank you, Your Honor.